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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MARY GADE, Director of the Illinois Environmental Protection Agency,
Petitioner,
v.
NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Occupational Safety and Health Act's preemption of state regulation of issues addressed by federal occupational health and safety standards in the absence of an approved state plan applies to dual, as well as to single, purpose or effect state laws.

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS [1]

The Chamber of Commerce of the United States of America (Chamber), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organizations in the United States. It represents the interests of over 180,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations. The Chamber regularly represents the interests of its member-employers in

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

important employment matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the Federal government.[2]

The Chamber has a significant interest in the question presented in this case. The vast majority of its members are subject to the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 651 *et seq.* (1988), *as amended by* Pub. L. 101-508, tit. III, § 301, 104 Stat. 1388-29 (1990). The question presented raises the possibility that, in addition to their responsibilities under the OSH Act, the Chamber's members will also be faced with an array of state law measures. Variances or conflicts among, and the cumulation of responsibilities created by, these measures pose significant compliance issues for Chamber members operating in more than one state and across state lines.

STATEMENT

At issue in this case is whether Illinois may enact laws that relate to issues addressed by federal occupational safety and health standards promulgated pursuant to the Occupational Safety and Health Act of 1970 ("Act" or "OSH Act"), Pub. L. No. 91-596, 84 Stat. 1590, 29 U.S.C. § 651 *et seq.* Petitioner claims that, notwithstanding the OSH Act's preemption provisions, Illinois' hazardous waste laws are valid because they address public, as well as occupational, safety and health issues. The background of the OSH Act, the federal regulations, the state laws, and the prior proceedings are as follows:

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[2] The Chamber has sought to advance those interests in a wide spectrum of OSH Act and employment litigation matters before this Court. *See, e.g., Lechmere, Inc. v. NLRB*, 60 U.S.L.W. 4145 (U.S. Jan. 27, 1992); *Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171 (1991); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *Asta v. Illinois*, No. 88-1783 (1990) (U.S. cert. denied Oct. 3, 1989).

1. In the Occupational Safety and Health Act, Congress endeavored "to assure so far as possible [that] every working man and woman in the Nation [has] safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). To that end, Congress among other things authorized the Secretary of Labor ("Secretary") "to set mandatory occupational safety and health standards." 29 U.S.C. §§ 651(b)(3), 655(a). Congress conferred broad discretion on the Secretary, not only as to the creation of appropriate health and safety standards, but also with respect to the granting of variances from those standards and the enforcement of the Act. 29 U.S.C. §§ 655(d), 659.

At the same time, Congress also sought to achieve safe workplaces and to reduce the federal role "by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws . . . ." 29 U.S.C. § 651(b)(11). Congress therefore directed that the OSH Act does not "prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect . . . ." 29 U.S.C. § 667(a) ("Section 18(a)"). In addition, Congress expressly preserved the operation of certain state laws, stating that the OSH Act does not "supersede or in any manner affect any workmen's compensation law or . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with the respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). At the same time, however, Congress provided that if a State "desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [it] shall submit a State plan for the development of such standards

and their enforcement." 29 U.S.C. § 667(b) ("Section 18(b)").

Under the Act, the Secretary "shall approve the [state] plan" if the State satisfies certain conditions. 29 U.S.C. § 667(c) ("Section 18(c)"). These conditions include providing safety and health standards at least as effective as federal requirements, and, through reporting requirements, enabling federal oversight of state health and safety efforts. *Id.* Even after the Secretary has approved a state plan, she is authorized to enforce federal standards for a three-year period. 29 U.S.C. § 667(e). At the end of that period, the Secretary is required to make a determination that the State is meeting its obligations under its occupational safety and health plan. *Id.*

Once the Secretary makes that determination, she is herself ousted of regulatory authority and the State's authority becomes exclusive. 29 U.S.C. § 667(e). However, the Secretary is required "on the basis of reports submitted by the State agency and [her] own inspections [to] make a continuing evaluation of the manner in which each State having a plan . . . is carrying out such plan." 29 U.S.C. § 667(f). If the Secretary finds that a state is not in compliance with its plan, the Secretary may after notice and a hearing withdraw her prior approval of the plan. 29 U.S.C. § 667(f). At that time, the plan "cease[s] to be in effect." *Id.* But Congress specifically afforded states continued "jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan . . . ." *Id.*

To encourage and assist the states in their efforts to promote occupational safety and health standards, Congress provided for federal grant monies to be made available to the states. 29 U.S.C. § 672. These grants are to be used in developing state plans, in increasing the expertise and enforcement capabilities of personnel engaged in state occupational safety and health programs, and in "otherwise improving the administration and enforcement

of state occupational safety and health laws. . . ." 29 U.S.C. § 672(a). States that develop approved plans may receive funding for up to 50 percent of the costs of their occupational health and safety programs. 29 U.S.C. § 672(g).

2. In 1986, concerned about controlling and cleaning up hazardous wastes, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, 100 Stat. 1690 (1986). In SARA, which amended the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. § 9601 *et seq.* (West 1983 and Supp. 1991), Congress further directed the Secretary to "promulgate standards for the health and safety protection of employees engaged in hazardous waste operations," pursuant to Section 6 of the OSH Act. SARA § 126 (codified at 29 U.S.C. § 655 (note)). Specifically, SARA requires the Secretary to establish standards for site analysis, training, medical surveillance, protective equipment, engineering controls, maximum exposure limits, informational and new technology programs, handling of hazardous wastes, decontamination procedures, and emergency responses. *Id.*

In response to SARA, the Secretary promulgated OSHA's Hazardous Waste Operations and Emergency Response Regulations, 29 C.F.R. § 1910.120 (1991) ("Hazardous Waste Regulations"). These regulations require, among other things, that employers provide training for employees working in proximity to hazardous wastes, including 40 hours of off-site training and three days of actual field experience. 29 C.F.R. § 1910.120(e)(3)(i). The regulations address other hazardous waste safety measures as well, including the provision of equipment, protective clothing, and procedures for handling emergency responses. 29 C.F.R. § 1910.120(e)(4).

In promulgating the Hazardous Waste Regulations, the Secretary noted that "Section 18 of the OSH Act also expresses Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards," and added that "a state can avoid preemption only if it submits, and obtains Federal OSHA approval of, a plan for the development of such standards and their enforcement . . . ." 54 Fed. Reg. 9315 (March 6, 1989). The Secretary also stated that she had used "regulatory preemption of state law to the minimum level necessary" by providing that "[s]afety and health programs developed and implemented to meet other Federal, state or local regulations are considered acceptable in meeting [the regulation's hazardous waste safety and health] requirement if they cover or are modified to cover the topics required in [the regulation]. An additional or separate safety and health program is not required by this paragraph." 29 C.F.R. 1910.120(b) (note).

3. In 1991, two years after the promulgation of these federal occupational safety and health regulations, Illinois enacted the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Ann. Stat. ch. 111, ¶ 7701 *et seq.* (Smith-Hurd Supp. 1991) ("Operators Act"), and the Hazardous Waste Laborers Licensing Act, Ill. Ann. Stat. ch. 111, ¶ 7801 *et seq.* (Smith-Hurd Supp. 1991) ("Laborers Act"). Designed to "promote job safety and . . . protect life, limb and property," these statutes require, *inter alia*, that individuals working with hazardous waste have at least 40 hours of training under a program conducted within the State of Illinois. *Id.* at ¶¶ 7702, 7705, 7802, 7805. Additionally, under these statutes, applicants must pass a written examination prescribed by the Illinois Environmental Protection Agency, have had a minimum of 4000 hours of handling equipment used with hazardous waste, and complete annual refresher courses of at least eight hours. *Id.* at ¶¶ 7705, 7706, 7707, 7805, 7806.

4. Thereafter, the National Solid Waste Management Association ("NSWMA") challenged the Operators Act and the Laborers Act on the grounds that, first, these laws are preempted by the OSH Act and the regulations promulgated thereunder because Illinois is not a "state plan" jurisdiction, and, second, that the Illinois acts violate the Commerce Clause of the United States Constitution. Following an evidentiary hearing, the district court ruled that the Illinois acts were neither expressly nor implicitly preempted by federal law, with the exception of the requirement that training be conducted within the State of Illinois. Pet. App. 54-60, 62. The district court refused to consider the Commerce Clause challenge on ripeness grounds, reasoning that Illinois had not yet promulgated final rules for implementing the acts. Pet. App. 61-62.

On appeal, the Seventh Circuit held that "Section 18 expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard." Pet. App. 17. Accordingly, it held that the Illinois acts were preempted. *Id.* In doing so, the court rejected the argument that a state law with non-occupational (as well as occupational) health and safety "purposes" or "effects" should survive preemption analysis, holding that the statutory question is merely "whether the challenged state law . . . constitutes, in a direct, clear and substantial way, regulation of worker health and safety." *Id.* at 19.

INTRODUCTION AND SUMMARY OF ARGUMENT

The OSH Act was enacted as part of the sweeping scheme of "New Federalism" that characterized the domestic programs of the administration of President Richard Nixon. In announcing his administration's approach to domestic policy, President Nixon declared that his "purpose . . . [was] to present a new . . . and drastically different approach . . . [from] the way the re-

sponsibilities [had previously been] shared between the State and Federal Governments . . . . [T]hese proposals . . . represent the first major reversal of the trend toward ever more centralization of government in Washington. . . . [I]t is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the States and to the people." Richard Nixon, The President's Address to the Nation on Domestic Programs, 5 Weekly Comp. Pres. Doc. 1103 (Aug. 8, 1969).

Presidnet Nixon's New Federalism program was a vision of federal standards enforced through stronger state and local governments and supported by substantial federal funding. It was thus more a foray into "national localism," or perhaps "regulatory federalism," than the downsizing of the federal role that has characterized more recent approaches to states' rights. *See* Timothy Conlan, *New Federalism—Intergovernmental Reform From Nixon To Reagan*, xvi, 12-13, 84-86 (1988) ("Conlan"). While divesting the federal government of administrative burdens, the New Federalism program retained a substantial federal role in devising policy goals and in ensuring that the states meet them; the "unmet needs" at which the New Federalism was directed were national in scope and required continued federal involvement and federal encouragement of the states. *Id.*

The precise contours of the New Federalism legislation varied among the statutes enacted during the Nixon era. Some statutes, like the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.* (1988), were "direct mandates" under which state and local governments were simply required to comply with a particular federal policy. *Id.* Others, like the Emergency Highway Energy Conservation Act of 1974, 23 U.S.C. § 154 (1988), which prohibited the Secretary of Transportation from approving any highway construction project in states having a speed limit in excess of 55 miles per hour, were "crossover sanctions" under which federal funds for several programs would be jeopardized should recipients fail to comply with regulations in a single program. *See* Conlan at 85. Finally, there were "partial preemption" programs in which the federal statute set minimum standards and encouraged states to administer and apply these standards. *Id.*

The Clean Air Act was a prime example of this latter form of the New Federalism. That Act directed the Environmental Protection Agency to prescribe national air quality standards, and required each state to adopt an implementation plan. *See* 42 U.S.C. § 7409(a), (b) (1988). It permitted states to adopt any standards or limitations, so long as the states' standards were at least as stringent as the federal standards. *Id.*

The OSH Act is also a "partial preemption" program. *See* David Beam, *Washington's Regulation of States and Localities: Origins and Issues*, 7 Intergovernmental Perspective 8, 12 (Summer 1981). It too created a mechanism for establishing federal standards, and sought to transfer responsibility for implementation and enforcement of those standards to the states. 29 U.S.C. § 667. But, in contrast to the Clean Air Act and other such New Federalism statutes, the OSH Act does not require state participation and state plans. Rather, to ensure safe worksites, the OSH Act begins with a presumption of federal regulation, implementation, and enforcement, and merely permits states to opt-in and displace the federal government as administrator of the scheme. States may opt-in only pursuant to an approved state plan that meets certain statutory prerequisites and that is subject to continuing federal monitoring.

It is against this backdrop—concern with promoting federal standards and with encouraging states to take responsibility for those standards—that the OSH Act was enacted and that the preemption question in this case must be resolved. The statutory language, the context of the statute's enactment, its interpretation by the agency charged with implementing it, and the view of every court

of appeals that has considered the question all point to the same conclusion: state regulation of occupational health and safety issues addressed by federal health and safety standards are preempted in the absence of an approved state plan. Dual purpose laws do not fall within any sort of exception to this OSH Act preemption rule. They, like all other state laws that regulate occupational health and safety issues that are subject to federal standards, are preempted in the absence of a state plan.

ARGUMENT

As this Court has repeatedly stated, in judging whether a state law is preempted under the Supremacy Clause, "[t]he purpose of Congress is the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990) (internal quotations omitted). To discern the pertinent congressional intent, the Court must "examine the explicit statutory language and the structure and purpose of the statute," *id.*, as well the historical context in which the statute was enacted. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1, 13 (1980) (statutes "'must be given the meaning and sweep' dictated by 'their origins and their language'—not their language alone") (citation omitted); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147-48 (1963) (construing Agricultural Adjustment Act by reference to the provisions of the Federal Tobacco Inspection Act, passed by the same Congress on previous day).

In the present case, the New Federalism program of the Nixon Administration provides the historical context of the OSH Act's enactment. That context, together with the language, legislative history, and consistent administrative and judicial interpretation of the OSH Act, lead directly to the conclusion that federal regulation of occupational safety and health issues precludes state regulation of the same issues in the absence of an approved state plan. In the OSH Act, Congress promoted the New Federalism program of the era by empowering the states

to displace the Secretary as administrator of federal health and safety standards. But, to do so, it required the states to obtain federal approval of their occupational safety and health plans. And it ensured the primacy of the federal scheme by preempting state regulation in the absence of such an approved state plan.

I. THE OSH ACT PREEMPTS STATE REGULATION OF WORKPLACE ISSUES ADDRESSED BY FEDERAL HEALTH AND SAFETY STANDARDS IN THE ABSENCE OF AN APPROVED STATE PLAN.

The New Federalism program of the Nixon Administration envisioned federal standards that would be enforced by state governments. *See* Nixon, *supra* at 1103. While implementation of policy would be the responsibility of the states, the New Federalism contemplated that policymaking would be carried out at the federal level. *See* Conlan xvi, 12-13, 84-86. Thus, as explained above in detail (pp. 7-9 *supra*), it represented a new era of "national localism" and "regulatory federalism," not a down-sizing of the federal government's policymaking role that has characterized more recent approaches to federalism. *Id.*

The language of the OSH Act reflects precisely the goals of the Nixon Administration's New Federalism program—establishing national standards, encouraging states to take over enforcement of these standards, and intruding on state prerogatives where necessary to achieve federally-established goals. Preserving some sphere in which states may operate, the OSH Act instructs that "common law or statutory rights, duties and liabilities of employers and employees . . . with respect to [employment-related] injuries, diseases, or death" remain operative. 29 U.S.C. § 653(b)(4) ("Section 4(b)(4)"). It further provides that states may "assert[] jurisdiction under the State law over any occupational safety or health issue with respect to which no standard is in effect . . . ." 28 U.S.C. § 667(a) ("Section 18(a)"). However, the OSH Act also directs that any state that "desires to

assume responsibility for . . . occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan for the development of such standards and [their] enforcement." 29 U.S.C. § 667(b) ("Section 18(b)"). And Section 18(f) provides that, if the Secretary withdraws her approval of a state plan, the state may only retain "jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan . . . ." 29 U.S.C. § 667(f). These provisions, by "the normal reach of [their] words," *Garcia v. United States*, 469 U.S. 70, 76 (1984), whether read alone or with reference "to the design of the statute as a whole and to its object and policy," *Crandon v. United States*, 494 U.S. 152, 158 (1990), preclude any state regulation of an occupational safety or health issue with respect to which a federal standard has been established in the absence of an approved state plan.

Sections 18(a) and 18(b) of the OSH Act plainly lay out the regulatory universe envisioned by the Congress and President Nixon's New Federalism program: either no federal standard exists and a state therefore is free to regulate occupational health and safety issues, or a federal standard does exist and a state therefore is precluded from regulating with respect to those occupational health and safety issues unless it has an approved state plan. Section 18(b) explicitly provides that a state "*shall* submit a state plan for the development of such standards and their enforcement" if it desires to regulate an occupational safety and health issue for which a federal standard has been promulgated. 29 U.S.C. § 667(b) (emphasis added). Section 18(a) instructs that, if no related federal standard is in effect with respect to a particular occupational health and safety issue, a state is not preempted by the OSH Act from regulation of that issue. 29 U.S.C. § 667(a). Together, these two statutory provisions are most properly construed as preempting a state

from regulating with respect to an occupational health or safety issue as to which there is an existing federal standard if the state has failed to do what Section 18(b) provides that it "shall" do: submit to the Secretary an occupational safety and health plan that satisfies the requirements of 29 U.S.C. § 667(c) ("Section 18(c)").

Section 18(a)'s preservation of state authority where there are no federal standards would be superfluous if Section 18(b) did not oust a state from regulating in the absence of an approved state plan. Moreover, there would have been no reason in Section 4(b)(4) of the OSH Act categorically to preserve from preemption the "common law or statutory rights, duties, and liabilities of employers and employees" if Section 18(b) did not preclude state regulation of issues regulated by federal standards in the absence of an approved state plan. And, of course, Section 18(f)'s preservation of jurisdiction over enforcement of state standards in cases initiated prior to withdrawal of plan approval by the Secretary is devoid of meaning if the states are not generally preempted from regulating in the absence of an approved plan. *See* 29 U.S.C. § 667(f).

Petitioner apparently does not dispute (Pet. Br. 17, 30) that there is a federal occupational safety and health standard that relates to the subject of the Illinois statutes at issue in this case. Nor does she dispute that Illinois does not have a state plan. Rather, like Judge Easterbrook in his separate opinion below, petitioner suggests (Pet. Br. 14-20) that, since Section 18(b) does not use the words "preempt" or "supersede," that section can be read in isolation to allow concurrent federal and state regulation of occupational health and safety issues. Under this view, Section 18(b) merely provides the means through which a state may obtain exclusive regulatory jurisdiction over occupational health and safety issues.

This Court, however, has never held that a finding of preemption turns on whether Congress has employed the

terms "preempt" or "supersede" in drafting a statute. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 530-532 (1977) (holding that the federal statute that "prohibits the imposition of '[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under' the Act" constitutes "explicit pre-emption."). Moreover, to construe Section 18(b) in the fashion suggested by petitioner would, as noted above, render Sections 4(b)(4) and 18(a) of the OSH Act superfluous and ineffectual, which of course traditional canons of statutory construction counsel against. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Furthermore, such a construction would directly contradict Section 18(f)'s command that, with narrow exception, if the Secretary withdraws her approval of a state plan, the state is stripped of its authority to regulate with respect to issues as to which a federal standard exists. Indeed, such a construction would contradict the uniform view of the federal courts of appeals, which have all agreed that state regulation of occupational health and safety issues addressed by federal standards is precluded in the absence of an approved state plan. *See, e.g., Associated Indus. of Mass. v. Snow*, 898 F.2d 274, 278 (1st Cir. 1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 55 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 592 (3d Cir. 1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989). This uniform course of decision establishes a clear meaning that should not lightly be overturned. *See Reves v. Ernst & Young*, 494 U.S. 56, 74-75 (1990) (Stevens, J., concurring). Finally, and most importantly, to adopt petitioner's construction of the OSH Act would ignore the statute's legislative origins and do violence to its purpose and scheme.

In enacting the OSH Act, Congress was vitally concerned with the growing number of industrial accidents and work-related illnesses in the country. *See* S. Rep. No. 1282, 91st Cong., 2d Sess. 1-5 (1970), *reprinted in*

Leg. Hist. 141;[3] 116 Cong. Rec. 37,345 (1970), Leg. Hist. 445 (statement of Sen. Harris). Congress determined that most states had poor records in the area of occupational health and safety regulation. *See, e.g.*, 116 Cong. Rec. at 37,628, Leg. Hist. 517 (statement of Sen. Nelson); 116 Cong. Rec. at 37,626, Leg. Hist. 513 (Statement of Sen. Muskie) ("Only four states have adequate standards . . . . Nowhere are enforcement mechanisms and penalties adequate to force industry compliance with existing standards"). Moreover, because the states had frequently expressed concern that employers would simply move their businesses to states with less stringent regulations, Congress determined that the states were unlikely on their own to more vigorously enforce occupational health and safety standards. *See, e.g.*, 116 Cong. Rec. at 38,392-393, Leg. Hist. 1049 (statements of Rep-Karth); 116 Cong. Rec. at 37,325, Leg. Hist. 415 (statement of Sen. Williams); 116 Cong. Rec. at 36,521, Leg. Hist. at 343 (statement of Sen. Saxbe). Thus, in the OSH Act, Congress provided for federal standards and federal enforcement. *See* 116 Cong Rec. at 37,604, Leg. Hist. 457 (statement of Sen. Schweiker) ("I would like to point out that the reason we are writing this law is because the present laws in the states have not been adequate . . . . That is why we are writing a federal law.").

While this approach solved the enforcement question, it threatened to create a larger federal bureaucracy and collided with the New Federalism concerns of the time. Accordingly, Congress included in the OSH Act inducements to states to increase their involvement in occupational health and safety regulation. *See* S.Rep. No. 1282, 91st Cong., 2d Sess. (1970), Leg. Hist. 141 ("Encouragement is given to Federal-state cooperation, and financial assistance is authorized to enable states, under approved

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[3] Citations to "Leg. Hist." may be found in: Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, P.L. 91-596) (Comm. Print 1971).

plans, to take over entirely and administer their own programs for achieving safe and healthful job sites for the Nation's workers."). These inducements included federal funding of the development and implementation of state plans, provision of an opportunity for state control of the statute's regulatory apparatus, and, where appropriate, the opportunity to deviate from federal standards to account for local conditions. *See* 29 U.S.C. §§ 667(c), 672. A state wishing to do so, however, has to file and obtain approval of an appropriate occupational safety and health plan. *See* 116 Cong. Rec. at 37,631, Leg. Hist. 525 (statement of Sen. Dominick); S. Rep. No. 1282, 91st Cong., 2d Sess. 62 (1970), Leg. Hist. 201; 116 Cong. Rec. at 37,629-630, Leg. Hist. 519-22 (remarks of Sen. Cranston); 116 Cong. Rec. at 38,382, Leg. Hist. 1022 (remarks of Rep. Hathaway).

Indeed, in adopting this approach, Congress expressly declined to follow the different tack that it had taken only a year before in a related statute, the Federal Coal Mine Health and Safety Act of 1969 ("FCMHSA"). *See* Pub. L. 91-173, 83 Stat. 742 (1969) (codified at 30 U.S.C. § 801 *et seq.*). That statute, drafted by the same Senate and House committees that drafted the OSH Act, has no federal approval procedure and expressly states that more stringent state laws are *not* superseded by federal regulations. *See* 30 U.S.C. § 955 (1988). In considering the enactment of the OSH Act, however, Congress declined to follow the FCMHSA's supplementary enforcement model; it rejected two bills that would have allowed state standards to remain in effect if they did not conflict with OSHA standards and if they offered "significantly greater protection." *See* S. 2788, 91st Cong., 1st Sess. 28 (1969), Leg. Hist. 58; H.R. 13,373, 91st Cong., 1st Sess. 28 (1969), Leg. Hist. 706; H.R. Rep. No. 1291, 91st Cong., 2d Sess. 11 (1970), Leg. Hist. 841; H.R. Rep. No. 1765, 91st Cong., 2d Sess. 42 (1970), Leg. Hist. 1195; *Hearings on H.R. 843, H.R. 3809, H.R. 4249, H.R. 13,373 Before the Select Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 1st Sess. 396-97, 487-88, 490-92 (1969) (remarks of Martin R. Catherwood, Industrial Commissioner, Dep't of Labor, State of New York). Rather, Congress enacted Section 18(b) of the OSH Act, which required states to obtain approval of the Secretary through a state plan before seeking to regulate an occupational health and safety issue as to which the Secretary has promulgated a federal standard.[4]

Together with Sections 4(b)(4), 18(a), and 18(f) of the Act, Section 18(b) of the OSH Act embodies the new Federalism goal of encouraging the transfer of governmental responsibility to the states. As petitioner herself recognizes (Pet. Br. 5, 17, 20), through federal subsidies for plan development and implementation, the OSH Act encourages states to adopt state plans and assume regulatory authority with respect to occupational health and safety issues. But Section 18(b) reflects the special OSH Act twist on the New Federalism program: by generally preempting state law in the absence of an approved state plan, Section 18(b) ensures that federal occupational health and safety standards will be secured either through the Federal government's own monitoring and enforcement efforts or through its monitoring of a state's implementation of an approved state plan of occupational health and safety regulation.

Under the OSH Act, the submission of a state plan is absolutely essential to the federal government's ability to ascertain that a state is, in fact, meeting its obligations and securing the goals of the OSH Act. States with occupational health and safety plans must either adopt the pertinent federal standards or demonstrate to the Secre-

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[4] Petitioner errs in placing weight on portions of the legislative history of the OSH Act that address only the interim period between enactment of the OSH Act and the promulgation of federal standards by the Secretary. (Pet. Br. 23-26). In any event, Congress made clear the need for state plans, both to effectuate federal oversight of State enforcement and to encourage states to take over the federal regulatory role. *See supra* at pp. 14-16.

tary that their standards are at least as effective as the federal standards. *See* 29 C.F.R. § 1953.21 (1991). They must also report to the Secretary concerning their compliance with their plans. 29 U.S.C. § 667(c). The entire state plan mechanism, which requires the Secretary's approval before a state may resume regulation of a federally-addressed field, would be essentially ineffective if the states could on their own continue to issue standards in that field. Section 18(f) in fact makes it completely clear that they may not do so.[5]

Indeed, in this respect, the language of the OSH Act is critically different from the language of other statutes of the New Federalism era, reflecting Congress' special concern for federal control over occupational health and safety policymaking. The OSH Act does not include a provision authorizing state standards that are more stringent than federal ones in the absence of a state plan. *See, e.g.*, 33 U.S.C. § 1370(1) (1988) (Clean Water Act); 42 U.S.C. §7416 (1988) (Clean Air Act). Nor does it contain other language, typical of New Federalism legislation, that recognizes the "primary responsibilities and rights of the states" in the subject matter of the legislation. *See, e.g.*, 33 U.S. § 1251(b) (1988) (Clean Water Act); 42 U.S.C. § 7401(a)(3) (1988), *as amended by* Pub. L. 101-549, tit. I, § 108(k), 104 Stat. 2468 (1990) (Clean Air Act). And it does not contain a savings clause which provides that nothing "shall . . . preclude or deny the right of any state . . . to adopt or enforce"

[5] Petitioner errs in suggesting (Pet. Br. 20, 22) that the Illinois statutes cannot be preempted because they promote the congressional goal of workplace safety. This Court has never held that the fact that a state law enhances or promotes a federal statutory goal precludes a finding that the state law is preempted. *Cf. Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 290-91 (1986) (state statute debarring three-time violators of the National Labor Relations Act from doing business with the state is preempted even though state law was designed to reinforce requirements of federal Act). The question is whether the state statute purports to advance the federal goal in a way that Congress has prohibited. That is the situation here, since no state plan has been submitted by Illinois.

standards. *See, e.g.*, 33 U.S.C. § 1370 (Clean Water Act); 42 U.S.C. § 7416 (Clean Air Act). Rather, in Section 18(b), the OSH Act provides that a state "shall" submit an appropriate plan to the Secretary if it wishes to regulate with respect to occupational health and safety issues as to which the Secretary has issued a federal standard, and it preserves state jurisdiction over such issues only so long as the state's occupational safety and health plan is properly in effect. 29 U.S.C. § 667(b), (f). This critical textual difference confirms that, in the absence of an approved state plan, the OSH Act does indeed preempt state regulation of occupational safety and health issues addressed by federal standards.[6]

In all events, any doubts about this interpretive matter must be resolved in favor of the preemption view. This Court has made it clear that, if congressional intent on an interpretive issue cannot be specifically determined, a reasonable interpretation by the agency charged with responsibility for administering a statute will be enforced. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Here, the Secretary has explicitly and consistently stated that, in the absence of an approved state plan, the OSH Act preempts state regulation where a federal standard has been issued. *See* 29 C.F.R. § 1901.2 (1991); 29 C.F.R. § 1910.1200(a)(2) (1991); 54 Fed. Reg. 9315 (March 6, 1989). Indeed, in promulgating the Hazardous Waste Regulations, the Secretary explicitly stated her intent

[6] Petitioner errs in relying on *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). (Pet. Br. 16-17). In that case, this Court held that, in expressly delegating regulatory authority under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, to the states, Congress did not thereby strip localities of their authority to regulate "because political subdivisions are components of the very entity the statute empowers." 111 S. Ct. at 2483. The absence of preemption there due to the relationship between state and local units of government is irrelevant to whether Congress has preempted state regulation.

to preempt related state law. *See* 54 Fed. Reg. at 9315-9316. These statements of intent to preempt state law are squarely within the Secretary's authority and must be sustained. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).[7]

Accordingly, the Illinois statutes at issue must be held preempted. They directly regulate issues addressed by a federal occupational safety and health standard in the absence of an approved state plan.[8]

[7] The AFL-CIO plainly errs in suggesting (AFL-CIO Br. 17-19) that the Secretary's interpretation is a mere "litigation statement" and is inconsistent with prior statements of her agency. An interpretation promulgated in a regulation of an agency (and Federal Register comment thereon) is not a mere litigation position of agency counsel; rather, it is an authoritative statement of agency policy by the executive charged with the responsibility for administering a statute and, for that reason, is entitled to the force and effect of law. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 231-35 (1974). Indeed, as Justice Scalia has suggested, this should be true even if the agency's present interpretation is inconsistent with a prior interpretation. *See* Antonin Scalia, *Judicial Deference To Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989). In any event, the Secretary's present interpretation of the OSH Act is in no way inconsistent with prior interpretations of her agency: the agency statements cited by the AFL-CIO involved instances in which the agency clarified that its regulation of a particular occupational health and safety issue did not extend to related aspects of that problem that the states were already regulating.

[8] Because Congress and the Secretary have clearly and manifestly expressed their intent to preempt state law in the absence of a state plan, *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707 (1985), is inapt. In *Hillsborough*, it was conceded that there was no express preemption. *Id.* at 714. In addition, the agency had clearly stated its intent *not* to preempt state and local law. *Id.* Precisely the opposite is true here.

II. THE ILLINOIS LICENSING STATUTES AT ISSUE ARE PREEMPTED EVEN THOUGH THEY ARGUABLY HAVE NON-OCCUPATIONAL AS WELL AS OCCUPATIONAL HEALTH AND SAFETY PURPOSES AND EFFECTS.

Obviously recognizing the error of petitioner's argument that Section 18 has no preemptive force of its own, petitioner's amici disavow any reliance on it. *See* AFL-CIO Br. 13-14 & n.5; States Br. 6-12. Rather, they merely join petitioner in contending in the alternative (Pet. Br. 29-37; AFL-CIO Br. 11-26; States Br. 6-14) that any preemptive effect of Section 18 should not extend to state laws—such as the Illinois statutes at issue here—that purportedly advance public as well as occupational health and safety concerns. The arguments that petitioner and her amici advance in support of this contention, however, are wholly without merit; indeed, they wholly fail to understand the New Federalism origins and purposes of the OSH Act.

First, petitioner and her amici argue (Pet. Br. 31-32, AFL-CIO Br. 5-12; States Br. 4-5) that occupational licensure is a historic police power of the states and that there is a presumption in this Court's cases against preemption of such historic police powers. But, as they themselves must and ultimately do acknowledge, this argument merely sets the framework for preemption analysis; it does not resolve it. Even where historic state police powers are involved, Congress and the federal agencies charged with enforcing federal statutes have the power to promote superior federal interests by preempting state laws. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. at 153. As explained above (pp. 11-20 *supra*), that is precisely what Congress and the Secretary, acting on the letter and spirit of the New Federalism program, have done in the context of the OSH Act.

Second, petitioner and her amici argue (Pet. Br. 29-36, AFL-CIO Br. 12-22) that the OSH Act does not "clearly and manifestly" evince a congressional intent to preempt "dual" purpose or effect laws. This argument is also unfounded.

With the exception of those state laws saved by Section 4(b)(4), the OSH Act preempts all state occupational health and safety standards that "relat[e] to" an occupational safety and health issue as to which the Secretary has promulgated a federal regulation. Section 18(b), 29 U.S.C. § 667(b). The phrase "relates to" is commonly understood to mean to have "a connection with or reference to." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). *See Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 483. Thus, the preemptive effect of Section 18 extends to any state occupational health and safety standard that has a "connection with or reference to" a health and safety issue as to which the Secretary has promulgated a federal regulation. The Illinois statutes at issue here plainly have such a connection and reference. That they may have other, non-occupational purposes or effects *as well* is statutorily irrelevant.[9]

Contrary to the AFL-CIO's contention (AFL-CIO Br. 16-17), the reference to state "occupational" health and safety standards in Section 18(b) does not save "dual" purpose or effect laws from preemption. By definition, at least one of the purposes or effects of a "dual" impact law is the setting of requirements for health and safety

[9] Although the AFL-CIO seeks to cabin the reach of the phrase "relates to" under the OSH Act (AFL-CIO Br. 16), it never explains why the identical term used in two statutes enacted at nearly the same time—the OSH Act and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*—should not be identically construed by the courts. That the OSH Act does not include other words that appear in ERISA (AFL-CIO Br. 16 n.6) has no relevance to the "plain" meaning or "normal sense" of the phrase "relates to." *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 97.

in the workplace—*i.e.*, the setting of occupational health and safety standards. That the state law may have other purposes and effects means only that, in addition to being an "occupational health and safety standard," the state law is something more as well. Stated differently, it is plain that the additional, non-occupational purposes or effects of a state law do not render that law any less of an "occupational health and safety standard."

Third, petitioner and her amici erroneously suggest (Pet. Br. 35; AFL-CIO Br. 26; States Br. 13-14) that finding preemption of the two Illinois statutes at issue here is the death knell of state occupational licensing and other dual-purpose or effect statutes. Even if true, of course, this should not defeat the preemptive effect of Section 18. The fact is, however, that the states remain free to engage in substantial occupational licensing and other safety and health regulation.

For example, the states are free to engage in occupational licensing or other safety and health regulation where the Secretary has not established a federal health and safety standard or where the state laws do not "relate to" occupational health and safety standards issued by the Secretary. For example, the vast majority of Illinois' licensing statutes contain no provisions that concern, let alone "relate to", issues covered by federal standards and therefore are not preempted.[10]

[10] *See, e.g.*, Ill. Ann. Stat. ch. 111, ¶ 1101 *et seq.* (Smith-Hurd 1978 & Supp. 1991) (Plumbers Licensing Act); Ill. Ann. Stat. ch. 111, ¶ 4121 *et seq.* (Smith-Hurd Supp. 1991) (Pharmacy Practice Act); Ill. Ann. Stat. ch. 111, ¶ 1701-1 *et seq.* (Smith-Hurd Supp. 1991) (Barber, Cosmetology and Esthetics Act); Ill. Ann. Stat. ch. 111, ¶ 5351 *et seq.* (Smith-Hurd Supp. 1991) (Clinical Psychologist Licensing Act); Ill. Ann. Stat. ch. 111, ¶ 7901 *et seq.* (Smith-Hurd Supp. 1991) (Speech-Language Pathology and Audiology Practice Act); Ill. Ann. Stat. ch. 111, ¶ 5201 *et seq.* (Smith-Hurd Supp. 1991) (Professional Engineering Practice Act); Ill. Ann. Stat. ch. 111, ¶ 2800 *et seq.* (Smith-Hurd Supp. 1991) (Funeral Directors and Embalmers Licensing Act).

The states are also free to license or otherwise regulate where the Secretary has limited the scope of federal regulations. As the AFL-CIO ironically acknowledges (AFL-CIO Br. 18-19), the Secretary has so narrowed her regulations in two distinct areas: motor vehicle safety and fire marshal services. In each instance, the Secretary has carefully measured the state regulation against the federal obligations. *See, e.g.*, OSHA Policy Statement (April 1972), *reprinted in* 1 Empl. Safety & Health Guide (CCH) ¶ 5008.81. Thus, rather than indicate that Section 18 lacks preemptive effect as applied to licensing or dual-impact statutes, these two examples demonstrate both the Secretary's sensitivity to federalism issues and, more significant, her ability to make it clear which state measures she intends to displace.

Finally, the states remain free to operate in those areas that Congress has expressly put beyond the Secretary's reach. State workers' compensation laws are not superseded or otherwise affected by the OSH Act. *See* 29 U.S.C. § 653(b)(4). Nor are common law rights of employees altered by the OSH Act. *Id.* In addition, a state's own employees are not subject to the federal standards. *Id. at* § 667(c)(6). And, of course, a state may submit a plan to the Secretary and thereby obtain exclusive authority over occupational safety and health issues. *Id. at* § 667(b). Indeed, of the fifty-six jurisdictions eligible to submit plans for OSHA approval,[11] twenty-three are operating under approved plans covering both private and public employment; and approved plans covering only public employment are operational in another two states. *See* 1 Empl. Safety & Health Guide (CCH) ¶ 5003. In short, the prospect envisioned by petitioner and her amici—that preemption in this case will result in wholesale invalidation of state licensing and other dual-impact statutes—is greatly overblown.

[11] These jurisdictions are the fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, the Trust Territories, and the Virgin Islands.

Finally, petitioner and her amici plainly err in suggesting (Pet. Br. 34-36; AFL-CIO Br. 23-26) that Congress could not have intended to require the states to enact entirely new and extensive regulatory schemes in order to preserve their traditional right to protect the public health and safety. To begin with, states may continue to regulate public health and safety concerns so long as they do not, at the same time, regulate occupational health and safety issues that are the subject of federal standards. Second, the burden need not be as great as petitioner and her amici suggest: the legislative history makes it clear that "a State's program need not be all-encompassing; it may restrict itself to a particular hazard or industry." S. Rep. No. 1282, 91st Cong., 2d Sess. 18 (1970), Leg. Hist. 158. *See* H.R. Rep. No. 1291, 91st Cong., 2d Sess. 32 (1970), Leg. Hist. 862. In all events, it is clear that Congress imposed the state plan requirements because it believed that they were necessary to ensure the accomplishment of the OSH Act's goals. The state plan concept, in some form, was a vital component of the New Federalism program. In a variety of areas addressed by New Federalism legislation—clean air, clean water—states were required to adopt comprehensive state plans. While the states may find those state plan requirements burdensome in some instances, they are precisely what made the OSH Act part of the unique New Federalism program of the era in which the statute was enacted.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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